UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

KEY GAS COMPONENTS, INC. **Employer** **and** **LOCLA LODGE 244, DISTRICT LODGE 54, ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO** **Petitioner**	**Case No. 8-RC-16239**

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[1] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.

[1] The Parties have field briefs which have been carefully considered.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

   All full time and regular part-time production and maintenance employees, including machine operators, set-up, tool room, shipping and receiving, inspection and assembly employees employed by the Employer and/or its temporary agency, CPM, at its Cleveland, Ohio facility; but excluding office clerical, professional and managerial employees, guards and supervisors as defined in the Act.[2]

The Employer is an Ohio corporation engaged in the manufacture of gas valves and manifold components at a facility on 1966 East 66th St, Cleveland, Ohio, the only location involved. Complete Payroll Management, Inc. ("CPM") is an Ohio corporation engaged in providing staffing and related human resource services to its customers. Its principal place of business is located at 3740 Carnegie Avenue, Cleveland, Ohio. There are approximately 38 employees in the unit found appropriate herein.

The Petitioner seeks to represent a unit of production and maintenance employees, including the Employer's solely-employed employees and the employees supplied by CPM.[3] The Employer and CPM contend that the petition is defective because it does not name CPM as an employer or joint employer involved in the proceeding; CPM did not assent to the Petitioner acting as the bargaining representative for its employees employed by the Employer; and the Employer's employees do not share a sufficient community of employment interests with the employees supplied by CPM.

[2] The classifications contained in the unit are in accord with a stipulation between the parties.

[3] The petition also originally included all "temporary" production and maintenance employees. At the hearing, the Petitioner amended the petition by deleting the reference to temporary employees.

Further, the Petitioner seeks to exclude employee John Rodgers from the unit on the ground that he is a technical employee who should not be included in the petitioned-for unit of production and maintenance employees. The Employer contends that Rodgers should be included in the unit because he performs some inspection work, which is included in the unit description.

About 22 of the Employer's 38 production and maintenance employees are on the Employer's payroll ("Key Gas employees"). The other 16 production and maintenance employees working at the Employer's Cleveland facility were supplied by CPM and are on the CPM payroll ("CPM employees"). The record indicates that CPM supplies the Employer with entry-level employees who perform general light industrial work (e.g. assembly), while the Employer directly hires more highly-skilled employees (e.g. tool-makers, set-up employees, inspectors).[4] CPM employees work for the Employer on a permanent, rather than temporary, basis. Some CPM employees have worked at the Employer's facility for over a year. After a Key Gas or CPM employee has worked 90 days for the Employer, a supervisor prepares an evaluation. It is within the Employer's sole discretion to offer a CPM employee the opportunity to transfer to the Employer's payroll, and the record indicates that such transfers have in fact occurred.

The Board has held that a unit composed of employees who are jointly employed by a user employer and a supplier employer, and employees who are solely employed by the user employer, is permissible under the Act without the consent of the employers. **M.B. Sturgis, Inc.**, 331 NLRB No. 173, slip op. at 7 (2000). The Board applies the traditional community of interest test to decide the appropriateness of such units. **Id.**, slip op. at 8. Employer consent is still required, however, when a union seeks to represent employees in a multiemployer unit. **Id.**, slip op. at 8, 11; **Greenhoot, Inc.**, 205 NLRB

[4] The arrangement between the Employer and CPM is an oral agreement subject to cancellation by either party at any time.

250 (1973). This case involves one user employer and is thus an employer unit rather than a multiemployer unit. Accordingly, CPM's failure to consent to the Petitioner acting as bargaining representative for its employees employed by the Employer does not invalidate the petition.

Further, under **M.B. Sturgis**, a union may name whom it wishes – the user employer, the supplier employer, or both the user and supplier employers as joint employers – on the election petition. In its determination of the appropriate bargaining unit, the Board does not consider the potential bargaining difficulties that may arise from such a situation. **Interstate Warehousing of Ohio**, 333 NLRB No. 83, slip op. at 1 (2001). Thus, the Petitioner's failure to include CPM as an employer or joint employer on the petition does not invalidate the petition. **Professional Facilities Management, Inc.**, 332 NLRB No. 40, slip op. at 2 (2000); **Interstate Warehousing of Ohio**, 333 NLRB No. 83, slip op. at 2.

In addition, when a petitioner seeks to bargain only with a user employer, and the user employer is a statutory employer of the employees involved, the Regional Director need not determine whether the user employer and the supplier employer are joint employers. **Outokumpu Copper Franklin, Inc.**, 334 NLRB No. 39, slip op. at 1 (2001). Here, the petitioner seeks to bargain only with the Employer. The record establishes that the Employer has exclusive control over almost every meaningful aspect of the CPM employees' employment, and is thus a statutory employer of the CPM employees.[5] Although under these circumstances, I am not required to determine whether the Employer and CPM are joint employers of the CPM employees, I note, however, the record would support a conclusion that they are.

[5] In its brief, the Employer raises concerns regarding the soundness of **M.B. Sturgis, Inc.** under the Act and the U.S. Constitution. While I have considered the Employer's arguments, I am bound to apply Board precedent in deciding this matter.

The Act does not require that the petitioned-for unit be the **most** appropriate unit, but only that it be **an** appropriate unit. **Overnite Transportation Co.**, 322 NLRB 723 (1996); **Morand Bros. Beverage Co.,** 91 NLRB 409, 418 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). In deciding the appropriate unit, the Board first considers the Union's petition and whether that unit is appropriate. **Overnite Transportation**, at 723. A unit is appropriate if there is a sufficient community of interest among the groups of employees involved. **Swift and Co.**, 129 NLRB 1391 (1961).

The CPM employees share a sufficient community of interest with the Key Gas employees so that they may be included in the same unit. The Key Gas employees and the CPM employees all receive hourly wages, which are determined by the Employer according to the particular job and skill level of the particular employee. Both groups of employees work on the first and second shifts, working the same hours during those shifts. They also share the same vacation and holiday schedule. CPM and Key Gas employees work side-by-side in the production area of the facility on the same ultimate product. They are supervised and evaluated by the same supervisors and are subject to the same disciplinary process. Although only CPM can fire CPM employees, the Employer can unilaterally end their tenure at Key Gas by informing CPM that it no longer requires the CPM employees' services.

The only significant differences between CPM and Key Gas employees are that they have different benefits packages, different beginning skill levels,[6] and different companies process their paychecks. On the basis of the foregoing and the record as a whole, I find that the common terms and conditions of employment outweigh the differences, so that CPM and Key Gas employees may be included in the same unit. See **Outokumpu Copper Franklin, Inc.**, 334 NLRB No. 39, slip op at 1-2.

[6] DeWayne Carson, a CPM employee, stated that he performs set-up work, which the Employer claims is only performed by Key Gas employees. Carson admitted that no one at Key Gas ever told him he was a set-up employee.

The Employer's contentions that the CPM and Key Gas employees do not share a sufficient community of interests are unpersuasive. For example, the Employer states that, unlike Key Gas employees, all major decisions regarding employment problems of CPM employees revert to CPM for possible investigation and an ultimate decision. However, the record indicates that when CPM account representative Mihelich conducts investigations into alleged discrimination, payroll problems, or theft involving CPM employees, he reports his findings to both CPM and the Employer. Further undermining the Employer's argument is Key Gas general manager Kuhn's testimony that Key Gas and CPM employees are subject to the same disciplinary process. The Employer also states that, unlike Key Gas employees, CPM employees fill out a CPM employment application and receive payroll checks from CPM. The fact that different companies perform these ministerial functions does not persuade me that CPM and Key Gas employees lack a sufficient community of interest. The Employer also contends that only Key Gas employees can be "promoted" within the company. However, Kuhn testified that the Employer determines wage increases for CPM employees. In any event, the Employer's offer of employment to a CPM employee working for Key Gas is the functional equivalent of an offer for promotion within the company. In this regard, the fact that CPM employees must fill out the Employer's I-9 and W-4 forms before switching payrolls is irrelevant to the community of interests issue.

I further conclude, in agreement with the Petitioner, that the Employer's draftsman John Rodgers should be excluded from the unit. Rodgers is directly supervised by the Employer's general manager and does not report to the production supervisors. The record indicates that between 90 and 98 percent of Rodgers' time is spent doing drafting and lab work, which he performs in an office area upstairs and separate from the production area. The Employer's general manager believes that Rodgers is the only employee capable of performing these functions. Rodgers also inspects tooling coming into the facility. He does not inspect production parts in the regular course of his duties.

However, Rodgers substitutes for primary production inspector Fred Howe when Howe is absent.[7] Rodgers is an hourly employee, earning from $1-2 more per hour than Howe. When Rodgers fills in for Howe, his wage rate does not decrease and he continues to report directly to the general manager as opposed to Howe's production supervisor. In addition, as part of his regular duties, Rodgers performs impromptu inspections of the production process. This work involves talking to the production employees. Rodgers uses his independent judgment to determine if there are problems with the production process. If there are problems, he is required to report directly to the general manager.

Dual-function employees – employees who perform more than one function for the same employer – may vote even though they spend less than a majority of their time on unit work, if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit. **Martin Enterprises**, 325 NLRB 714, 715 (1998); **Berea Publishing Co.**, 140 NLRB 516 (1963). The Board has no bright line rule as to the amount of time required to be spent performing unit work, but rather examines the facts in each particular case. See, e.g., **Oxford Chemicals**, 286 NLRB 187 (1987)(employee who regularly performed unit work for 25 percent of each working day was included in the unit); **Pacific Lincoln-Mercury, Inc.**, 312 NLRB 901, n. 4 (1993)(employee who spent only 5 to 10 percent of his time performing unit work not eligible to vote); **McMor-Han Trucking Co.**, 166 NLRB 700, 702 (1967) (employee who drove truck on 20 days during the year with no regularity, pattern, or consistent schedule, was excluded from unit of truckdrivers). See also **Syracuse University**, 325 NLRB 162 (1997)(**Davison-Paxon** four-hour-per-week formula does not apply in dual-function cases).

[7] The record establishes that Howe was out for a two-week period within the past six months.

Rodgers does not regularly perform unit work for sufficient periods of time to demonstrate that he has a substantial interest in working conditions in the unit. Even assuming that Rodgers spends 10 percent of his time interacting with production employees, the only time he spends doing unit work is when he substitutes for Howe. Thus, Rodgers performs a limited amount of unit work on a sporadic basis. To the extent he interacts with production employees while performing impromptu inspections of the production line, his interests are more aligned with those of management than those of the production employees.[8] On the basis of the foregoing and the record as a whole, I conclude the Employer's draftsman Rodgers does not share such a community of interest with the production and maintenance employees as to require his inclusion in the unit. **Overnite Transportation Co.**, at 723.

For the foregoing reasons I find that the unit sought by the Petitioner is an appropriate unit for the purposes of collective bargaining and I shall direct an election in that unit. Additionally, I shall exclude John Rodgers from the unit.

The Parties agreed that the following employees are ineligible to vote in the election directed herein:

Roy Kuhn	-	CEO and President
Mary Anne Kuhn	-	Vice-President
James Kuhn	-	General Manager
Dennis Kuhn	-	Plant Manager
Carina Mauck	-	Office Manager
Addie Palecek	-	Purchasing Agent
John Coleman	-	Production Control Manager
Edmund Kalen	-	Quality Manager
Mark Weber	-	First Shift Supervisor
Frank Zsaludko	-	Manufacturing Engineer
Christian Calomfirescu	-	Second Shift Supervisor

[8] See **Virginia Mfg. Co.**, 311 NLRB 992, 992-993 (1993)(production control clerk excluded from production unit although he spent 40 percent of his time on production floor, because time was spent monitoring the efficiencies of production employees, who might view his activities as potentially adverse to their employment interests and more aligned with those of management); **Lundy Packing Co.**, 314 NLRB 1042 (1994).

As there is no record evidence to the contrary, I accept the Parties' foregoing stipulation and exclude the above-named individuals from the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Local Lodge 244, District Lodge 54, Association of Machinists and Aerospace Workers, AFL-CIO**.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to

communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the **full** names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility**, 315 NLRB 359 (1994)**.** The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by August 16, 2001.

Dated at Cleveland, Ohio this 2nd day of August 2001.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

440-3350